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No. 84-1564

In the Supreme Court of the United States

OCTOBER TERM, 1985

KERRY J. MONICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motion for a new trial based on alleged prosecutorial misconduct and newly discovered evidence.

2. Whether petitioner was denied effective assistance of counsel at trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-10) and the order of the district court denying the motion for a new trial (Pet. App. B 1-6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1984. The petition for a writ of certiorari was filed on February 26, 1985, and is therefore out of time under Rule 20 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on 80 counts of Medicaid fraud, in violation of 42 U.S.C. 1396h, and 80 counts of mail fraud, in violation of 18 U.S.C. 1341. The district court subsequently granted in part petitioner's

motion under 28 U.S.C. 2255 to vacate or set aside sentence and her motion under Fed. R. Crim. P. 35 to reduce sentence. The court set aside her convictions on 32 counts, and sentenced petitioner to suspended concurrent terms of two years' imprisonment, three years' probation, and a total fine of $5,000 on Counts 80 and 160. As to all remaining counts, petitioner was sentenced to serve concurrent terms of three years' probation.

1. The evidence showed that petitioner, a psychiatrist, made numerous Medicaid claims for personally rendered psychiatric services when she had not in fact provided such services, and after she had been informed by an official responsible for administering the Hawaii Medicaid plan that she must personally render claimed-for services. The evidence also showed that petitioner developed a system of duplicate appointment books to substantiate her false claims. Pet. App. A 1-2.

2. a. Following her conviction, petitioner moved in the district court for a new trial, alleging prosecutorial misconduct and newly discovered evidence (Pet. App. B 1). Petitioner presented to the trial court the affidavits of three prosecution witnesses, Steadman, McClain, and Weisbrod, which she contended constituted newly discovered evidence.[1] She claimed further that the prosecutor was aware of the substance of the affiants' statements but failed to disclose that information to her. Petitioner also asserted that the prosecutor exerted pressure on the affiants to change their testimony. The district court described these affidavits as follows (*id.* at 2-4):

> Mr. Steadman's affidavit discusses a "team concept" wherein [petitioner] supervised Steadman. These statements contradict Steadman's testimony at trial that he

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[1]The affidavits are reproduced as appendices C, D, and E to the petition for a writ of certiorari.

> is a superior therapist to the [petitioner], that [petitioner] did not attend group therapy sessions on a regular basis, and that [petitioner] signed Medicaid forms for patients treated by Steadman solely because Steadman could not make claims for payment on the Hawaii Medicaid Program. * * * Further, Steadman's affidavit presents his opinion that [petitioner] did not intend to commit fraud, and Steadman's objections to the prosecution of [petitioner]. * * *
>
> * * * * *
>
> Ms. McClain's affidavit * * * states that, as she now reads the governing state and federal regulations, [petitioner's] actions were in compliance with those regulations. This conflicts with McClain's testimony at trial that a Medicaid claim cannot be submitted unless the physician submitting the claim has personally seen the patient. McClain's affidavit also attempts to enlarge her testimony at trial, by justifying [petitioner's] practice of concealment of the actual treating therapist's name, with falsified notes and appointment books. Finally, McClain's affidavit presents her opinion that [petitioner] did not intend to commit fraud * * *.
>
> * * * * *
>
> Mr. Weisbrod's affidavit discusses the origin of the duplicate appointment books, and the possibility of prosecutorial misconduct * * *. The affidavit merely reiterates Weisbrod's testimony at trial * * *. Further, Weisbrod's affidavit presents his personal opinions about [petitioner's] intent * * *.

b. The district court denied petitioner's motion for a new trial (Pet. App. B 1-6). The court ruled that the evidence in the affidavits could not be characterized as "newly discovered" because it could have been elicited on cross-examination at trial (*id.* at 4). The court stated that to the

extent the affidavits attempted to show petitioner's lack of criminal intent, they merely presented the affiants' opinions and would therefore be immaterial and inadmissible at trial (*id.* at 4-5). The district court further noted that 11 other witnesses had testified against petitioner at trial, and accordingly concluded that the evidence in the affidavits was not sufficiently material to warrant a new trial. The district court also rejected petitioner's claim of prosecutorial misconduct, finding that it consisted only of the assertion that the prosecution failed to disclose personal opinions of witnesses and of "vague allegations of 'pressure' to change testimony" (*id.* at 6).

3. The court of appeals affirmed petitioner's convictions. The court held that the district court "did not abuse its discretion in refusing to grant [petitioner's] motion for a new trial on the basis of nondisclosure of exculpatory evidence" (Pet. App. A 3). The court of appeals also upheld the district court's ruling that "the prosecutor's conduct did not amount to a due process violation" (*ibid.*), noting that petitioner had failed to present any evidence that any witness changed his testimony in response to threats by the prosecutor (*ibid.*).

In addition, the court of appeals found no merit in petitioner's claim that she was denied the effective assistance of counsel (Pet. App. A 5).[2] Relying on this Court's decision in *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), the court of appeals concluded (Pet. App. A 7) that "counsel's conduct at trial did not reflect a failure to exercise the skill of a reasonably competent attorney." The court also noted that petitioner had not shown "how the defense counsel's errors prejudiced the defense" (*id.* at 6) and accordingly

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[2]The court below also rejected petitioner's claims regarding, inter alia, pre-indictment delay and certain evidentiary rulings by the trial court.

ruled that, under *Strickland*, petitioner was not entitled to relief because "[e]ven if the defense counsel's conduct were unreasonable, it is not reasonably probable that, but for the defense counsel's errors, the outcome of the case would have been different" (*id.* at 7).

In particular, the court of appeals rejected petitioner's claim that her trial counsel was ineffective because he failed to interview government witnesses; the court of appeals noted that since "defense counsel was provided with statements of all government witnesses at least 10 days prior to the commencement of the trial" (Pet. App. A 6), any failure to conduct interviews was not prejudicial. The court also rejected petitioner's contention that counsel's failure to object to the admission of irrelevant and prejudicial testimony rendered his assistance ineffective; the court noted that "the trial record is replete with instances where the defense counsel made evidentiary objections" and that where counsel did not object he "could have legitimately thought that an objection would draw further attention to the irrelevant testimony" (*ibid.*). Finally, the court ruled that petitioner's trial counsel was not ineffective because he failed to use a memorandum written by a key government witness to impeach that witness; the court noted that that memorandum did not directly contradict the witness's testimony (*id.* at 7).

ARGUMENT

1. Petitioner contends (Pet. 8-21) that the information contained in the affidavits of Steadman, McClain, and Weisbrod was information favorable to her that should have been disclosed by the government under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). See also *United States* v. *Bagley*, No. 84-48 (July 2, 1985). This contention does not merit review for several reasons.

First, even if the statements in the affidavit were *Brady* material, petitioner would be entitled to relief "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the [trial] would have been different." *Bagley*, slip op. 14 (opinion of Blackmun, J.); see *id.* at 1 (White, J., concurring). Compare *Agurs*, 427 U.S. at 112-113, with *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 24. As the courts below explained, the statements in the affidavits did not meet this standard. Weisbrod's affidavit contained an account of why petitioner kept two sets of appointment books; but the district court found that these statements "merely reiterate[] Weisbrod's testimony at trial [and they] * * * constitute[] mere cumulative evidence" (Pet. App. B 4). Otherwise, the affidavits consisted primarily of statements by the affiants that they believed that petitioner acted in good faith (*e.g.*, Pet. App. C 3-4) and criticism of the prosecutors and assertions that they brought "pressure[]" to bear on the affiants (*e.g.*, Pet. App. D 1, E 1, 2). As the district court ruled, the affiants' personal opinions about petitioner's good faith were inadmissible (Pet. App. B 4-5; see Fed. R. Evid. 701), and their allegations of prosecutorial misconduct not only were vague and unsubstantiated but contained no suggestion that any witness changed his testimony in response to the pressure (Pet. App. B 5-6).

In any event, petitioner's characterization of the statements in the affidavits as *Brady* material is incorrect. Petitioner was acquainted with the affiants and knew that they might have evidence relevant to her defense. The prosecutors, far from concealing the affiants or suppressing their testimony, called them as witnesses at trial and exposed them to cross-examination by petitioner. Consequently, this case simply does not involve "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103. At

most, the affiants' statements are evidence "discovered from a neutral source after trial" (*id.* at 111); such evidence would entitle petitioner to a new trial only if she both showed that she could not reasonably have discovered this evidence before or during trial and "satisf[ied] the severe burden of demonstrating that [the] newly discovered evidence probably would have resulted in acquittal" (*ibid.*; footnote omitted). The findings of the district court leave no doubt that petitioner cannot make either of these showings.

2. Petitioner further contends (Pet. 24-35) that she is entitled to a new trial because the prosecutor improperly pressured the affiants. We note that when petitioner cross-examined the affiants at trial, she could have inquired into any prosecutorial pressure or intimidation, but she did not do so. Moreover, as the district court ruled (Pet. App. B 6), the affidavits contain only "vague allegations of 'pressure' " unsupported by any factual detail; the district court was therefore entitled to reject these allegations without holding a hearing. Cf. *Blackledge* v. *Allison*, 431 U.S. 63 (1977); *Machibroda* v. *United States*, 368 U.S. 487, 495-496 (1962). In any event, the affidavits do not suggest in any way that petitioner was prejudiced by any of the alleged misconduct of the prosecutors; on the contrary, Weisbrod specifically stated in his affidavit that despite being "pressured by threat" he "refused" to "change [his] story" (Pet. App. E 1). In the absence of any prejudice, such allegations of prosecutorial misconduct do not entitle petitioner to relief. See *Beck* v. *Washington*, 369 U.S. 541, 555 (1962); cf. *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Morrison*, 449 U.S. 361 (1980).

3. Finally, petitioner contends (Pet. 35-38) that her trial counsel rendered ineffective assistance by failing to question the affiants, when they testified at trial, concerning petitioner's good faith and lack of intent to defraud. This contention also does not merit review. To begin with, it was

not properly raised below. Petitioner did assert, before the court of appeals, that she had received ineffective assistance of counsel, but the basis of that claim was that her attorney had failed to interview prosecution witnesses, had failed to object to the admission of irrelevant and prejudicial testimony, and had not impeached a government witness. See Pet. App. A 5-7; pages 4-5, *infra*. As to each contention, the court below rejected petitioner's assertion of ineffective assistance. Petitioner did not assert, before the court of appeals, that her trial counsel was ineffective because he failed to cross-examine witnesses on her good faith. Since this contention was not presented to the courts below, it is not properly raised in this Court.

In any event, petitioner's current claim is without merit. As the district court noted, the only "evidence" contained in the affidavits concerning petitioner's good faith was cumulative testimony and the inadmissible opinions of the affiants. Trial counsel's failure to elicit cumulative and inadmissible material on cross-examination could not have prejudiced petitioner and therefore did not constitute ineffective assistance of counsel. See *Strickland*, slip op. 21-26.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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